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82-1990

IN THE

Supreme Court of the United States

ROBERT RUSSELL AUSTIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE PROSECUTOR'S FAILURE TO DISCLOSE AN APPARENT PROMISE OF LENIENCY MADE TO A KEY PROSECUTION WITNESS WAS SUFFICIENTLY PREJUDICIAL TO DEPRIVE PETITIONER AUSTIN OF A FAIR TRIAL AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Petitioner says "Yes."

The Respondent says "No."

II.

WHETHER ATTORNEY BORDOLEY'S ACTIONS AND INACTIONS VIOLATED PETITIONER AUSTIN'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Petitioner says "Yes."

The Respondent says "No."

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Here comes the Petitioner, ROBERT RUSSELL AUSTIN, by and through his attorneys, BELL & HUDSON, P.C., and respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 2, 1983.

OPINION BELOW

United States v *Robert Russell Austin*, No. 82-1080 (6th Cir. March 2, 1983). Published at , F.2d , (1983) appended hereto.

JURISDICTION

On March 2, 1983, the United States Court of Appeals for the Sixth Circuit entered an order affirming the Petitioner's conviction. On May 3, 1983, the Honorable Sandra D. O'Connor entered an order extending the time in which the petition for Writ of Certiorari can be filed to May 31, 1983. This petition is being filed within the extended time limit and seeks to invoke this court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

AMENDMENT (V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. U.S. Const. Amend. V.

AMENDMENT (VI.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, *and to have the Assistance of Counsel for his defense.* U.S. Const. Amend. VI.

STATEMENT OF THE CASE

On April 30, 1981, the Petitioner, ROBERT RUSSELL AUSTIN, was indicted and charged with mail fraud in viola-

tion of 18 U.S.C. §1341[1] as well as conspiracy to violate 18 U.S.C. §1962(c)[2]. Also named in the indictment were Will Franklin Ulmer, Lonnie Ervin, James Veal and Theodore Roosevelt McAdoo.

A jury trial was held in the United States District Court, Eastern District of Michigan before the Honorable Ralph B. Guy, Jr., and continued for a month. On October 21, 1981, the Petitioner was found not guilty on three of the mail fraud counts, but was convicted on the remaining fifteen mail fraud counts as well as the conspiracy charge. On January 15, 1982, the Petitioner was sentenced to serve thirty (30) months in a federal prison.

The government's key witness at the trial was Gwendolyn Clemens, a major co-conspirator who was granted immunity in exchange for her testimony (Tr. at 39). Clemens testified that the Petitioner was an active participant in the arson-for-profit scheme because he adjusted fires knowing that the contents lists were false. (Tr. at 53-57, 61).

Petitioner Austin testified that he had no knowledge that any of the fires listed on the indictment were deliberately set. (Tr. at 903). The Petitioner is a licensed public adjuster and

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[1]18 U.S.C. 1341 states in relevant part that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promise, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

[2]18 U.S.C. 1962(c) states in relevant part that:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interestate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

has been adjusting fire losses on behalf of homeowners since 1960. (Tr. at 900). During his tenure as a public adjuster, the Petitioner has adjusted thousands of fires. As far as he was concerned, there was nothing out of the ordinary in the processing of the claims listed on the indictment. Both the Petitioner and his partner, Sadie Guinn, testified that whenever a fire job was brought into the office, the arson squad was contacted before the claim was processed. (Tr. at 905, S.G. dep.). Out of the 120 fires which Clemens, Ulmer and Ervin allegedly set, the Petitioner only adjusted thirteen fires. (Tr. at 221). This accounts for only ten percent of the fires, which is less than any of the other adjusters that the organization used. (Tr. at 221).

As for the documentary evidence, Sadie Guinn testified that she often signed the Petitioner's name to contents lists or contracts (S.G. dep.) since he was periodically out of the office due to illness. (Tr. at 951-52). Thomas Krinock, an insurance adjuster, testified that on the contents portion of the claim, he dealt with Sadie Guinn. (Tr. at 516).

Clemens' credibility was, therefore, critical to the outcome of the case. The jury, however, was not apprised of everything that Clemens had to gain from testifying against the Petitioner. The government revealed that Clemens had been given immunity in relation to this trial. (Tr. at 39). On cross-examination, however, Clemens stated that no one promised her leniency and she may well be prosecuted as a result of her testimony. (Tr. at 104).

More importantly, the government did not reveal another promise of leniency that was apparently made to Clemens. In August of 1978 Clemens pled guilty to delivery of heroin and conspiracy to deliver heroin. (Tr. at 326). Merely one month later she contacted the Drug Enforcement Agency and sought to reveal the arson-for-profit scheme. Her initial contact was with the DEA rather than the FBI. (Tr. at 105). Subsequently she spoke with an FBI agent, Joe Finnigan. (Tr. at 105).

Clemens testified that she was not yet sentenced on the state narcotics conviction because Joe Finnigan from the FBI "has handled it." (Tr. at 107). Almost five years later, Clemens still has not been sentenced. The sentencing date has been continuously adjourned at the prosecution's insistence. (See docket sheet attached hereto.) The government, however, never revealed that it made any promises to Clemens regarding her state conviction.

The Petitioner was convicted on January 15, 1982 and a notice of appeal was filed on January 19, 1982. After hearing oral arguments, the Court of Appeals affirmed the Petitioner's conviction on March 2, 1983.

REASONS FOR ALLOWANCE OF THE WRIT

SINCE THE COURT OF APPEALS ERRED IN ITS APPLICATION OF *GIGLIO* v *UNITED STATES* IT IS INCUMBENT UPON THIS COURT TO CLARIFY THE CIRCUMSTANCES UNDER WHICH AN UNDISCLOSED PROMISE MANDATES REVERSAL.

In *Giglio* v *United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972), the Supreme Court held that the prosecution's failure to disclose a promise of leniency made to its key witness violated the Due Process clause of the Fifth Amendment. *Id.* at 155. In *Giglio, supra*, an assistant United States Attorney, who apparently lacked authority, promised the government's key witness leniency if he testified in the government's behalf. This promise was not disclosed to the jury. The Court held that regardless of whether the particular assistant United States Attorney lacked authority to make such a promise, his promise was attributable to the government as a whole. *Giglio* at 154. Therefore, the government's failure to disclose the promise to the jury mandated a new trial. *Id.* at 155.

The lower courts have tried to devise tests under which they can determine if there as been a *Giglio* violation. These tests, however, lack uniformity in their application of the *Giglio*

decision. The First Circuit in *United States* v *Ramos Algarin*, 584 F.2d 562 (1st Cir. 1978) enunciated a two-prong test for determining whether there is a denial of Due Process under *Giglio*. The first prong is whether there is a promise of leniency which was made but not disclosed. The second prong is whether the failure to disclose could have any reasonable likelihood of affecting the jury's decision. *Ramos Algarin*, *supra* at 564.

The Ramos Algarin court indicated that the first step could be satisfied if the circumstances surrounding the case "give ground for suspicion that an undisclosed promise may have been made." *Id.* at 564. If such circumstances exist, then further inquiry is required. *Id.* at 565. The court seems to be indicating that if the defendant can put forth sufficient evidence which indicates that a promise was made, then the burden shifts to the government to show that it made no such promise. *Id.* at 564-65.

In the instant case, the government disclosed that Clemens was given immunity in the arson conspiracy case. (Tr. at 39). Yet at a later point, Clemens stated that no one promised her leniency and that she may very well be prosecuted in the future. (Tr. at 104). Furthermore, it is apparent that Clemens was made an additional promise of leniency beyond the grant of immunity on the arson conspiracy charge. The trial revealed that in August of 1978, Clemens pled guilty to delivery of heroin and conspiracy to deliver heroin in Recorder's Court for the City of Detroit. (Tr. at 326). One month later, in an obvious, self-serving attempt to make a deal in relation to her narcotics conviction, she contacted the Drug Enforcement Agency and asked to speak to someone from the FBI. Clemens revealed the alleged arson-for-profit scheme to Joe Finnigan from the FBI. (Tr. at 105). She further testified that she was not sentenced on her narcotics conviction because Joe Finnigan from the FBI "has handled it". (Tr. at 107). Almost five years after Clemens' plea was taken, she still has not been

sentenced. The sentencing date has been continuously adjourned since the time of the plea at the government's insistence. *See* docket sheet. Despite all this evidence, the government still contends that no additional promise of leniency was made to Clemens.

The Sixth Circuit, in affirming the Petitioner's conviction, held that the "allegations of an undisclosed promise do not approach the specificity of the allegations made in *Giglio*. The appellant's argument that an undisclosed promise was made are conclusory and without any factual support in the record." (Court's opinion at 4.)

This strict burden of proof that the Sixth Circuit places on the defendant is in conflict with that required by the First Circuit in *Ramos Algarin, supra*. As discussed *supra*, if the circumstances give grounds for suspicion that a promise was made, further inquiry is required. *Ramos Algarin, supra* at 564-65. In the instant case, the facts that Clemens has not been sentenced almost five years after her conviction and that she initiated the contact with a DEA agent gives rise to a strong inference that an additional promise of leniency was made. The burden should shift to the government to show that it made no such promise.

The Sixth Circuit held that even if such a promise was made "there was sufficient disclosure of Clemens' self-interest from which the jury could adequately judge her credibility." (Court's opinion appended hereto at 4). This indicates that the Sixth Circuit believed that the jury did not have to be fully apprised of Clemens' self-interest. In *United States* v *Butler*, 567 F.2d 885 (9th Cir. 1978), the court stated that the proper standard for determining whether the nondisclosure was sufficient to mandate a new trial is whether the "evidence might reasonably have affected the jury's judgment on a material point, without necessarily requiring a supplementary finding that it also would have changed its verdict." *Id.* at 890.

Once there is a determination that an undisclosed promise

was made, the sole inquiry should be whether that promise could have affected the jury's assessment of credibility. *Butler, supra* at 390. The government's evidence in this case was primarily dependent on Clemens' testimony. Although, there may have been corroborative documentary evidence it was Clemens' testimony "which made them legally and factually relevant and established the atmosphere in which they were interpreted." *Butler, supra* at 890. Clemens' credibility was, therefore, outcome-determinative and the undisclosed promise would have affected the jury's assessment of her credibility.

Although Clemens eluded to the fact that "Joe Finnigan has handled it" (Tr. at 107), the jury was not aware of any of the conditions upon which this apparent promise of leniency was based. It is clear from the events that transpired that this promise of leniency was premised upon Clemens' willingness to give favorable testimony in Petitioner Austin's trial. She obviously was willing to accommodate the government since she would be freed from the narcotics charge as well as the arson conspiracy charge. When the government stated on the record that Clemens was given immunity on the arson conspiracy charge, the government was bound to honor that promise. Any chance that Clemens would perjure herself was minimized. In regards to the narcotics conviction, however, the government was silent. Clemens realized that the government was not bound to honor that "bargain" until after she incriminated Petitioner Austin. The government used Clemens' state narcotics case like the sword of Damocles, hanging it over her head until satisfactory testimony was extracted from her in the Petitioner's trial. Clemens was in a very precarious position, yet the jury was not aware of it. The special circumstances surrounding the second promise were reasonably likely to affect the jury's assessment of credibility. *Giglio, supra* at 109; *Butler, supra* at 889.

The Sixth Circuit's decision is in conflict with the Ninth and First Circuit's interpretation of *Giglio* v *United States,*

supra. The Court should, therefore, grant a Writ of Certiorari pursuant to Rule 17 and review the issues presented in this case.

II.
THIS COURT HAS HELD THAT THE SIXTH AMENDMENT GUARANTEES EFFECTIVE ASSISTANCE OF COUNSEL, BUT HAS NOT YET SET A STANDARD FOR MAKING THAT DETERMINATION.

The Sixth Amendment guarantees all criminal defendants the right "to have the assistance of counsel for his defense." This Court has interpreted that clause to mean the *effective* assistance of counsel. *Powell* v *Alabama*, 287 U.S. 42, 53 S.Ct. 55, 77 L.Ed 158 (1932); *McMann* v *Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970). This Court has never enunciated the standard to be applied in determining whether a defendant was deprived of his right to the effective assistance of counsel, and the lower courts are split on the issue. *Contra, United States* v *DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); *Beasley* v *United States*, 491 F.2d 687 (6th Cir. 1974).

The ineffective assistance standard used by the Sixth Circuit is whether counsel was reasonably likely to render effective assistance. *Beasley* v *United States*, 491 F.2d 687, 696 (6th Cir. 1974). Several of Attorney Bordoley's actions and inactions deprived Petitioner Austin of his right to effective assistance of counsel and a fair trial.

Bordoley's most egregious error was his failure to ascertain the exact promise of leniency made to Clemens in regards to her narcotics conviction. Since Clemens was the government's key witness, her reasons for cooperating were crucial to her credibility. Clemens testified that Joe Finnigan from the FBI had handled her narcotics convictions. (Tr. at 107). Bordoley, however, failed to call Finnigan to testify. His testimony was crucial to Petitioner Austin's defense since it would have called into question Clemens' credibility. Any reasonable attorney would have called Finnigan to the stand. In a case where

the government's proofs were almost exclusively dependant on Clemens' testimony, Bordoley's failure to call Finnigan denied Petitioner Austin effective assistance of counsel.

As a further result of Bordoley's incompetence, evidence that related to uncharged crimes were admitted into evidence. While cross-examining Clemens, Bordoley asked a series of questions that related to uncharged fires.

> (By Mr. Bordoley)
>
> Q. We have talked here or you have made a statement that there were 1,000 fires that you know about?
>
> A. Yes.
>
> Q. And this so-called company of yours was involved in approximately 120 of them?
>
> A. Yes.
>
> (Tr. at 217-18)

Since Bordoley was careless enough to explore the matter of uncharged crimes on cross-examination, the court ruled that questions relating to said fires were proper redirect. (Tr. at 274). The following testimony was therefore admitted into evidence.

> (By Mr. Liebson)
>
> Q. Miss Clemens, I believe the question had to do with the indictment. There were some sixteen fires listed there. Are those the only fires that your particular group was involved in?
>
> A. No, it's not.
>
> Q. In the period from September, '74 to September '75, I believe the indictment lists some four fires that you say Mr. Austin was involved in adjusting. Were there any others during that period of time Mr. Austin was also involved in?
>
> A. Yes.

But for Bordoley's incompetence, this extremely prejudicial testimony would not have been admitted into evidence. *See United States* v *Forsythe,* 594 F.2d 947, 952 (3rd Cir. 1979), where the court held that reversible error was committed when the trial court admitted evidence of uncharged crimes.

Bordoley also waived the Petitioner's right to appellate review of sufficiency of the evidence, by not renewing his motion for a directed verdict at the close of defendant's case.

Finally, Attorney Bordoley's cross-examination of Clemens was inadequate. Clemens was the government's witness against Petitioner Austin. Bordoley, however, was not adequately prepared to impeach her testimony. For example, in relation to Clemens' narcotics conviction, it was Attorney Burns and not Bordoley who discovered the discrepancy between Clemens' testimony and her actual guilty plea. Clemens pled guilty to delivery of heroin and conspiracy to deliver heroin. (Tr. at 326). She had, however, testified that she pled guilty to intent to deliver cocaine. (Tr. at 106). For all the above reasons, Bordoley's representation of the Petitioner did not amount to reasonably effective assistance.

CONCLUSION

In order to resolve the conflicting applications of the Due Process requirement of *Giglio* v *United States*, as well as the Sixth Amendment, Right to Effective Assistance of Counsel, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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Dated: May 23, 1983

82-1080

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Filed March 2, 1983, John P. Hehman, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT RUSSELL AUSTIN,
Defendant-Appellant.

ORDER

BEFORE: KEITH and KENNEDY, Circuit Judges and SPEIGEL*.

This case arises out of a multi-count indictment against several defendants charging them with one count of conspiracy in violation of 18 U.S.C. §1962(d), one count of "use of an enterprise through a pattern of racketeering activity" in violation of 18 U.S.C. §1962(c), one count of investment of income derived from a pattern or racketeering in violation of 18 U.S.C. §1962(a), and twenty-three counts of mail fraud in violation of 18 U.S.C. §1341. The defendant-appellant was convicted of participation in the conspiracy and fifteen counts of mail fraud. We affirm.

The government's indictment charged that Will Ulmer, Lonnie Ervin, and Gwendolyn Clemens set up an unnamed land investment company or partnership in Detroit, Michigan. The company's purpose was to conduct the business affairs of the group. The only business the group conducted was an illegal arson-for-profit scheme. The insurance proceeds collected from the arsons were used to purchase other homes. These homes were also burned. In order to conceal who owned the partnership, the real estate was placed in the names of relatives and friends of the members of the group.

The Appellant, Robert Russell Austin, was a licensed public

*Hon. S. Arthur Spiegel, U.S. District Judge, Southern District of Ohio, sitting by designation.

adjuster who had been adjusting fires since 1960. Austin adjusted thirteen of the fires set by the conspirators. He maintains that he was unaware of any arson-for-profit scheme. However, the government charged that Austin knew of the fraudulent scheme and was an active participant who provided assistance and advice.

The Government's case was built around the testimony of Gwendolyn Clemens. Clemens testified that Austin was aware of the submission of false contents lists, that he was made aware of impending fires, that documents submitted listing various persons as the owners of houses and their contents were submitted without these persons ever talking to Austin, and that Austin charged the enterprise an 8% commission rather than the normal 10%.

On the other hand, Austin's attorney sought to impeach Clemens. He noted that she had stated that Austin and Ulmer were moving some furniture from a house. Defense counsel attempted to show that Austin was recovering from a gunshot wound at the time and could do no lifting. He also noted that Clemens testified that she did not disclose that the fires were arsons. And he argued that Clemens' testimony regarding conversations with Austin were contradictory.

The appellant contends that there appears to be some undisclosed promise of leniency which the government held over Clemens' head like the "sword of Damocles." The appellant does not cite any specific agreement, but relies on the fact that Clemens has not yet been sentenced on a narcotics charge in the state court. The sentencing hearing has been postponed several times. According to the appellant, this is evidence of a promise of leniency which was not disclosed to the jury.

On the other hand, the government disputes that it made any agreement which was not disclosed to the jury. The government makes the following argument in its brief:

> In resolving this issue, it must first be noted that the only promise made by any agent of the United States

> Government to Clemens was the one stated to the jury: that she was immunized relative to the arson scheme. Nonetheless, Clemens' testimony indicates that she may have believed she had some additional agreement concerning the pending State charges. It is difficult to understand defendant's claim that this constituted a prejudicial denial of his right to due process since the alleged promise of leniency was disclosed to the jury.

In *Giglio* v *United States*, 405 U.S. 150 (1972), the Supreme Court set up a two-step analysis for resolving this issue. First, it must be determined if the government made an undisclosed promise to a witness. Second, the court must determine if the undisclosed promise had any reasonable likelihood of affecting the jury. *See United States* v *Ramos Algarin*, 584 F.2d 562 (1st Cir. 1978); *United States* v *Bynum*, 567 F.2d 1167 (1st Cir. 1978).

The appellant's allegations of an undisclosed promise do not approach the specificity of the allegations made in *Giglio*. The appellant's argument that an undisclosed promise of leniency was made are conclusory and without any factual support in the record. Moreover, it appears that there was sufficient disclosure of Clemens' self-interest from which the jury could adequately judge her credibility.

The appellant also argues that he was denied the effective assistance of counsel. We note that this argument was not made in the district court. Therefore, this court is deprived of that court's findings on the issue. *See United States* v *Lang*, 644 F.2d 1232 (7th Cir.), *cert. denied*, 102 S.Ct. 338 (1981). Assuming that the issue is properly before this Court, we note that appellant's contention that trial counsel's representation was so defective as to violate the Sixth Amendment is without merit. *See Beasley* v *United States*, 491 F.2d 687 (6th Cir. 1974).

We also find that there was sufficient evidence in the record from which the jury could have found the appellant guilty of

participation in the conspiracy and the mail fraud counts. Accordingly, we affirm the judgment entered by Judge Ralph B. Guy, Jr. of the Eastern District of Michigan.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, Clerk

ISSUED AS MANDATE: MARCH 24, 1983
COSTS: NONE

(A True Copy)
Attest:
JOHN P. HEHMAN, Clerk
By: LINDA L. BRINSON, Deputy Clerk

CAS FELONY 05/23/83 CASE STATUS OPEN DEF 2 OF 2
CASE # 78007005 2 NAME CLEMENS,GWENDOLYN,YVONNE LPD 346352
D36 CRT # ARR AGCY WCOCF ALIAS

J A I L / B A I L S T A T U S			A T T O R N E Y S	D I S P O S I T I O N
JUDGE GARDNER	DATE		DEF CULPEPPER,W	
TYPE 2S CASH/OP	AMNT	50000	PRO CELESKEY,GER	
LOCN	BND #	11685	BDJ	

DOB: 00/00/00

CHGS/RESULTS	FILINGS/RESULTS
	07/18/79
	CONSOLIDATE SF

PROCEEDING	DATE	JUDGE	RESULT
PRETRIAL	07/30/79	FORD	A/CT ORDR
JURY TRI	08/23/79	FORD	I/JRY SLC
JURY TRI	09/24/79	FORD	A/CT ORDR
JURY TRI	08/27/79	FORD	PLD GLTY
SENTENCE	09/21/79	O'BRIEN	A/CT ORDR
SENTENCE	10/03/79	FORD	A/NO CRT
SENTENCE	10/11/79	FORD	A/RQ PROS
SENTENCE	10/25/79	FORD	A/RQ PROS
SENTENCE	11/29/79	FORD	A/RQ PROS
SENTENCE	12/20/79	FORD	A/RQ PROS
SENTENCE	01/10/80	FORD	A/RQ PROS
SENTENCE	02/14/80	FORD	A/RQ PROS
SENTENCE	02/28/80	FORD	A/RQ PROS
SENTENCE	03/28/80	FORD	A/RQ PR +

58

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CAS       FELONY              05/23/83   CASE STATUS OPEN          DEF   2 OF  2
CASE #  78007005    2  NAME  CLEMENS,GWENDOLYN.YVONNE          LPD  346352
   D35 CRT #                  ARR AGCY WCCCF       ALIAS
 J A I L / B A I L   S T A T U S     A T T O R N E Y S   D I S P O S I T I O N
JUDGE GARDNER        DATE              DEF CULPEPPER,V
TYPE  22 CASH/SP     AMNT    50000     PRO CELESKEY,CEC
LCCN                 BND #   11685     BDJ

DOB: 00/00/00
 CHGS/RESULTS      FILINGS/RESULTS   PROCEEDING   DATE      JUDGE       RESULT
374012A2       01 10/20/78          WARRANT      10/20/78 KOSCINSKI    SIGNED
DEL > 225 GR      RETN PROPRTY FL   ARR-WRNT     10/20/78 GARDNER      MUTE N/G
750157A        01 10/20/78          EXAM         10/30/78 TENNEN       A/RQ PROS
CONSPIRACY        STAY PROCEED FL   ARR-INFO     10/31/78 TENNEN       WAVD B/O
374012A2       02 12/04/78          EXAM         10/31/78 TENNEN       HELD B/O
DEL > 225 GR      WITHDRAW ATT FL   PRETRIAL     11/09/78 FORD         A/RQ DEFN
                  01/05/79          PRETRIAL     12/07/78 FORD         HELD
                  F-EVID-HEARG FL   PRETRIAL     01/18/79 FORD         A/OTH LIT
                  01/05/79          MOTION       01/25/79 FORD         A/UND ADV
                  TO SUPPRESS  FL   MOTION       02/02/79 FORD         A/UND ADV
                  02/15/79          MOTION       02/05/79 FORD         A/NO CRT
                  F-DISCOVERY  MR   MOTION       02/09/79 FORD         A/UND ADV
                  07/13/79          MOTION       02/15/79 FORD         A/CT ORDR
                  ADD WITNESS  GR   PRETRIAL     03/09/79 FORD         A/OTH L +
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Best Copy Available

CAS FELONY 05/23/83 CASE STATUS OPEN DEF 2 OF 2
CASE # 78007005 2 NAME CLEMENS,GWENDOLYN.YVONNE LPD 346352
DOB CRT # ARR AGCY WCOCF ALIAS

J A I L / B A I L S T A T U S			A T T O R N E Y S D I S P O S I T I O N
JUDGE GARDNER	DATE		DEF CULPEPPER,W
TYPE 2S CASH/OP	AMNT	50000	PRO CELESKEY.GER
LOCN	BND #	11685	BDJ

DOB: 00/00/00

CHGS/RESULTS	FILINGS/RESULTS	PROCEEDING	DATE	JUDGE	RESULT
		SENTENCE	04/24/80	FORD	A/RQ PROS
		SENTENCE	05/22/80	FORD	A/RQ PROS
		SENTENCE	06/26/80	FORD	A/RQ PROS
		SENTENCE	07/31/80	FORD	A/RQ PROS
		SENTENCE	09/11/80	FORD	A/RQ PROS
		SENTENCE	11/20/80	FORD	A/RQ PROS
		SENTENCE	12/18/80	FORD	A/RQ PROS
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		SENTENCE	11/12/81	FORD	A/RQ PROS
		SENTENCE	12/04/81	FORD	A/RQ PROS
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SENTENCE	04/16/82	FORD	A/RQ PROS
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SENTENCE	09/17/82	FORD	A/RQ PROS
SENTENCE	10/29/82	FORD	A/RQ PROS
SENTENCE	12/10/82	FORD	A/RQ PROS
SENTENCE	01/14/83	FORD	A/RQ PROS
SENTENCE	02/25/83	FORD	A/RQ PROS
SENTENCE	04/01/83	FORD	A/RQ PROS
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No. 82-1990

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT RUSSELL AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because of the prosecutor's alleged failure to disclose a promise of leniency made to a prosecution witness.

2. Whether petitioner was deprived of the effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not reported, but the affirmance is noted at 709 F.2d 1509 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1983. By letter dated May 3, 1983, Justice O'Connor extended the time in which to file a petition for a writ of certiorari to and including May 31, 1983, and the petition was filed on May 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of RICO conspiracy, in violation of 18 U.S.C. 1962(d), and on 15 counts of mail fraud, in violation

of 18 U.S.C. 1341.[1] He was sentenced to concurrent 30-month terms on each count (C.A. App. 29).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 1a-4a). It showed that Will Ulmer, Lonnie Ervin, and Gwendolyn Clemens set up an unnamed land investment company or partnership in Detroit, Michigan, the sole business of which was the pursuit of an illegal arson-for-profit scheme. The insurance proceeds collected from the arsons were used to purchase other houses that also were burned. To conceal who owned the partnership, the real estate was placed in the names of relatives and friends of the members of the group. Petitioner, a licensed public insurance adjuster, adjusted 13 of the fires set by the conspirators. Clemens testified at trial that petitioner knew about and was an active participant in the fraudulent scheme. She testified that petitioner was aware that false contents lists were being submitted, that he was made aware of impending fires, and that documents listing the houses' contents and various people as the owners were submitted without those persons' ever talking with petitioner. Finally, Clemens testified that petitioner charged the enterprise an 8%, rather than the usual 10%, commission.

In its examination of Clemens, the government established that she was testifying pursuant to an agreement that her testimony would not be used against her (Tr. 39). During cross-examination, Clemens was asked about the status of a state criminal prosecution in which she had pleaded guilty in early 1979 to possession of heroin with intent to distribute it. Clemens responded that she had not yet been sentenced in that case and that she had not had to appear for sentencing in it. She explained that Agent Joe Finnigan of

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[1]Petitioner was acquitted on three other mail fraud counts (C.A. App. 29).

the FBI had "handled" or "taken care" of it. Clemens stated, however, that Agent Finnigan did not tell her what he had done to take care of the matter and that he did not tell her that he had made arrangements with personnel in the state court (Tr. 107-108).

2. On appeal, petitioner contended that his conviction should be set aside because of an undisclosed promise to Clemens regarding her testimony. The court of appeals rejected this contention, concluding that petitioner had failed to satisfy the test established by *Giglio* v. *United States*, 405 U.S. 150 (1972), for granting relief. In particular, the Court found that petitioner's allegations of an undisclosed promise "do not approach the specificity of the allegations made in *Giglio*" and were "conclusory and without any factual support in the record" (Pet. App. 3a). Moreover, the court of appeals concluded that there was sufficient disclosure of Clemens' self-interest from which the jury could adequately evaluate her credibility (*ibid.*).

The court of appeals also rejected petitioner's claim that he had received ineffective assistance of counsel. The court noted that petitioner had not made this argument in district court, thereby depriving the court of appeals of findings on the issue, but that assuming the claim was properly before the court, it was "without merit" (Pet. App. 3a).

ARGUMENT

1. Petitioner contends (Pet. 5-9) that his conviction should be set aside under *Giglio* v. *United States*, 405 U.S. 150 (1972), because of an undisclosed promise of leniency to Clemens in connection with her state narcotics conviction. This contention is without merit.

a. Clemens herself testified before the jury on cross-examination that the state sentencing had been postponed at the instance of FBI Agent Finnigan (Tr. 107-108), the

federal agent to whom she had disclosed the arson scheme (Tr. 105-106). As petitioner points out (Pet. 5; Pet. App. 5a-8a) the state sentencing of Clemens has been continued on a number of occasions. We have been informed by Agent Finnigan that those postponements have been at the FBI's request because of Clemens' cooperation in a number of investigations, not simply this case, but that Clemens was promised nothing by the FBI other than that her cooperation would be brought to the attention of the state sentencing court. That much, of course, would seem obvious from Clemens' own testimony at trial that it was FBI Agent Finnigan who had "taken care" of the matter of her appearance for sentencing in state court. Petitioner has not identified any evidence of any arrangement between Clemens and the federal government that goes beyond these facts. Thus, concerning FBI Agent Finnigan's role with respect to Clemens' sentencing in state court, this is not an instance of an arrangement between the government and a witness that was "undisclosed" to the jury and therefore unavailable to it in judging the witness's credibility. This Court's decision in *Giglio* v. *United States*, *supra*, concerning a prosecution witness's false denial of an undisclosed agreement, therefore has no application here.[2]

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[2]Petitioner's assertion (Pet. 5-6) that there is a conflict between the decision below and the First Circuit's decision in *United States* v. *Ramos Algarin*, 584 F.2d 562 (1978), similarly is without merit. In *Ramos Algarin*, the prosecution read to the jury an agreement between a witness and the government under which the witness would plead guilty to one of four counts in return for his cooperation and the government would dismiss the remaining counts and make no recommendation as to sentence. However, the day after the jury returned its verdict, the government moved to dismiss all charges against the witness, and the motion was granted. 584 F.2d at 563-564. The government contended that the decision to dismiss was unilateral, based on the witness's minimal culpability. The court of appeals found the government's about-face troubling and indicated that it would have been inclined to remand for further proceedings but for the fact that the

b. Moreover, the Court in *Giglio* made clear that even where there was in fact a false denial of an undisclosed promise of leniency, a new trial is not automatically required. The defendant must show a "reasonable likelihood" that the information could "have affected the judgment of the jury" in order for a new trial to be ordered. 405 U.S. at 154 (quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959)). The court of appeals expressly applied that standard in this case (Pet. App. 3a) — a standard that is fully consistent with the Ninth Circuit's formulation in *United States* v. *Butler*, 567 F.2d 885 (1978), upon which petitioner relies (Pet. 7).

In this case, as the court of appeals held, "there was sufficient disclosure of Clemens' self-interest from which the jury could adequately judge her credibility" (Pet. App. 3a). Clemens herself testified that Agent Finnigan had arranged for the postponement of sentencing on the state charges, thereby sufficiently disclosing the basis for an argument by petitioner that she had an interest in testifying for the government in order to obtain a favorable sentence on those charges.[3] Given this, there is no reasonable likelihood that

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defendant had failed to satisfy the second requirement of *Giglio* by showing a reasonable likelihood of an effect on the jury's verdict. 584 F.2d at 565. Thus, in *Ramos Algarin*, the government's actions appeared flatly to contradict the agreement described to the jury. Here, in contrast, the state court's postponement of Clemens' sentencing is fully consistent with Clemens' testimony that Agent Finnigan had "taken care" of her appearance for sentencing, and therefore does not suggest some other undisclosed agreement with Clemens. Moreover, here, as in *Ramos Algarin*, there is not a reasonable likelihood that the jury's deliberation would have been affected by further development of the evidence pertaining to Clemens' relationship to Finnigan. See point 1(b) in text.

[3]We have been informed by the Assistant United States Attorney responsible for the case that although the closing arguments to the jury were not transcribed, it is his recollection that defense counsel in fact relied upon the postponement of sentencing in the state prosecution as evidence impeaching her credibility.

more detailed evidence of Clemens' relationship with Finnigan would have affected the jury's deliberations. Clemens also might have had a motive to testify favorably for the government in order to avoid prosecution in connection with the arson offenses for which petitioner was being tried.[4] And even aside from Clemens' testimony, there was other evidence to support the verdict. See, *e.g.*, Tr. 336-339, 391, 456-459, 466, 542-550, 582-586, 590-592, 598-609, 634-644, 962. The court of appeals' fact-bound application of the standard of materiality announced in *Giglio* to the circumstances of this cases does not warrant further review.

2. Petitioner also contends (Pet. 9-11) that he received ineffective assistance of counsel at trial. As the court of appeals observed (Pet. App. 3a), this contention was not presented to the district court. The court of appeals therefore was deprived of any findings by the trial court with respect to the nature of counsel's performance, his reasons

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[4]Petitioner also states (Pet. 6) that the government "disclosed that Clemens was given immunity in the arson conspiracy case (Tr. at 39)," thereby apparently contending that Clemens was granted immunity from prosecution for her role in the arson scheme. See also Pet. App. 2a-3a, quoting the government's brief in the court of appeals (at 12). From this premise, petitioner argues (Pet. 8) that the possibility that Clemens would perjure herself to favor the government was actually reduced because she already had received a commitment that she would not be prosecuted that the government was bound to honor. Contrary to petitioner's submission, to the extent the jury may have believed that Clemens received immunity from prosecution in return for her testimony, her credibility would actually have been significantly impeached in the jury's mind. In fact, however, it appears that Clemens was granted only immunity from the use of her testimony, not immunity from prosecution. Clemens actually testified in response to the prosecutor's questioning only that she had been granted immunity from the use of her testimony against her (Tr. 39), a statement consistent with her subsequent testimony that she believed she still could be prosecuted (Tr. 103-104). Thus, if the jury believed that Clemens could not be prosecuted, petitioner benefited from a more favorable picture of Clemens' self-interest than the circumstances warranted.

for any actions petitioner now asserts were deficient, whether counsel's performance was within the range of competence required of attorneys in criminal cases, and whether there was any resulting prejudice to petitioner. The courts of appeals generally are in agreement with the view of the court below (Pet. App. 3a) that because there often will be such deficiencies in the record, claims of ineffective assistance of counsel should not ordinarily be considered for the first time on direct appeal, but should instead be presented first to the district court in a motion for a new trial or on collateral attack under 28 U.S.C. 2255.[5]

The soundness of this approach is established by what petitioner labels as counsel's "most egregious error" — his failure to call Agent Finnigan to testify about the asserted promise of leniency to Clemens in regard to the state narcotics conviction. See Pet. 9-10. It is entirely possible, for example, that counsel did not call Finnigan because he believed that Finnigan would testify that he could not and did not promise Clemens leniency in connection with the state proceedings, thereby undermining the suggestion that Clemens' testimony was tainted by self-interest in order to obtain a favorable sentence in state court.

Petitioner's other instances of alleged ineffectiveness are equally insubstantial on the present record. Petitioner contends (Pet. 11), for example, that counsel was ineffective because he waived petitioner's right to appellate review of the sufficiency of the evidence by not renewing his motion for a directed verdict at the close of the government's case. But this claim obviously is groundless, because the court of

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[5]See cases cited in U.S. Br. at 40-41 n.30, *United States* v. *Cronic*, cert granted, No. 82-660 (Feb. 22, 1983) (a copy of the page proofs of this brief is being lodged with the Court).

appeals in fact considered on the merits (and rejected) petitioner's challenge to the sufficiency of the evidence (Pet. App. 3a-4a). Petitioner also contends (Pet. 11) that counsel was unprepared to cross-examine Clemens. He cites, however, only one feature of the cross-examination: that it was counsel for his co-defendant, not his own attorney, who brought out that Clemens in fact had pleaded guilty in state court to possession of heroin, not cocaine, as she had testified (Tr. 106, 326). But petitioner does not explain why the particular drug involved was of any moment, and he overlooks that he was not prejudiced in any event because the discrepancy was brought out by co-counsel.

Finally, petitioner objects (Pet. 10) to his attorney's questioning of Clemens on cross-examination about other fires, including 1,000 that she knew of and 120 in which her company was involved (Tr. 217-218). Petitioner contends that this course constituted error because it enabled the prosecutor to elicit on redirect examination that petitioner was involved in fires in addition to the four charged in the indictment (Tr. 274). Petitioner fails to point out that his attorney's questioning of Clemens about numerous other fires was part of an effort to establish that petitioner was involved as an adjuster in a relatively small percentage of the total number of fires Clemens had identified, thereby suggesting an absence of guilty knowledge (Tr. 217-221). Moreover, the evidence of the additional fires first was introduced by the attorney for petitioner's co-defendant (Tr. 137-138), so that petitioner's attorney simply acted in light of material already before the jury. Finally, as the district court noted in admitting the evidence (Tr. 277-278), the testimony would have been admissible under Fed. R. Evid. 404 in any event, as proof of a scheme and plan. At the very least, it cannot be found on the present record that counsel's questioning in these circumstances so far departed

from the normal range of competence of defense counsel and so prejudiced defendant that it constituted a Sixth Amendment violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

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